

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOSE LUIS SALDANA,

Plaintiff and Appellant,

v.

MIRANDA ANNE NOH,

Defendant and Respondent.

A146949

(Sonoma County
Super. Ct. No. SFL-54249)

**ORDER MODIFYING OPINION
[CHANGE IN JUDGMENT]**

THE COURT:s

The opinion filed herein on November 14, 2016, is modified as follows:

On page 14, in the disposition section, the following sentence is stricken:

Saldana is awarded costs of appeal.

The following sentence should be inserted in its place:

The parties are to bear their own costs of appeal.

There is a change in the judgment.

Dated: _____ P.J.

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Plaintiff Jose Luis Saldana appeals from a judgment below ordering him to make monthly child support payments of \$447 to his ex-spouse, defendant Miranda Anne Noh, for their minor daughter, born in 2008. He contends the trial court improperly set the amount of his monthly child support payments by deviating from the uniform guideline contained in the Family Code¹ without giving a statutorily required explanation and without Noh requesting that the court do so; improperly determined his earning capacity without relying on any evidentiary support; and denied him due process by not allowing him to fully address the court. We conclude the court properly exercised its discretion to set Saldana's child support payments according to the uniform guideline based on his earning capacity and without Noh requesting that it do so. However, we reverse the court's judgment because, as the parties acknowledge, the court based its child support order on information that was not admitted into evidence. We remand this case for

¹ All statutory references in this opinion are to the Family Code.

further proceedings consistent with our opinion, and instruct the court to give Saldana a full opportunity to be heard before ruling, consistent with basic due process principles.

BACKGROUND

In March 2011, Saldana filed a petition to establish a parental relationship regarding minor. That same month, Saldana and Noh were married, but domestic violence issues soon surfaced and divorce proceedings commenced a few months later.

I.

The Department's First Supplemental Complaint and Saldana's Answer

In November 2014, the Sonoma County Department of Child Support Services (Department), respondent in this appeal, intervened in Saldana's parentage action and filed a first supplemental complaint regarding Saldana's parental obligations. It sought a judgment ordering Saldana to pay \$1,492 a month in child support.

In his answer to the Department's first supplemental complaint, Saldana indicated he was minor's father, but contested the Department's child support request. In an income and expense declaration that he also filed with the court, he stated he earned \$600 a month working as a subcontractor for Llanos Landscape Maintenance (Llanos), which he had previously owned but had sold to his mother to pay his legal expenses. He owned Saldana Real Estate (SRE) and had a real estate broker's license, but it was "virtually impossible" to obtain new real estate clients because Noh's "false claims of domestic violence" had tarnished his reputation. He filed copies of his paycheck stubs from Llanos and Schedule C "Profit or Loss From Business" statements from Llanos's and SRE's 2011 tax returns. He stated he had expenses of \$940 per month, lived with his mother, brother, nephew, and minor, and that his mother paid some of the household expenses.

II.

The Department's Motion for Judgment

In July 2015, the Department filed a motion for judgment on its first supplemental complaint and an income and expense declaration from Noh. Noh stated she had earned \$12.35 an hour working full time for a hotel company from April 2013 to September 2014, was now out of work and receiving monthly disability payments of \$2,336.20, and

had inactive real estate and car sales licenses. With minor living with her, Noh's expenses were \$3,215.93 per month, of which others paid \$879.73.

The court held a hearing over two days on the Department's motion, at which Saldana and Noh each appeared in propria persona and the Department was represented by counsel. Just before the first day of the hearing on September 1, 2015, Saldana filed a response to the motion further addressing his financial status and contending, based on his status, that the trial court should order Noh to pay him \$36 per month in child support for his one-third time care of minor. He contended Noh had the ability to work and generate income, having worked in real estate and selling cars, was a certified bartender, had not disclosed that she lived with her parents, who contributed to her household expenses, and had help from her father in paying her bills. He also claimed Noh had no known physical impairments that prevented her from working.

III.

The First Day of the Hearing on the Department's Motion for Judgment

At the first day of the hearing on the Department's motion, the court indicated it would continue the matter to give everyone the opportunity to review Saldana's newly filed response, and then heard from the parties. Saldana made additional representations, including that, although he no longer had an ownership interest in Llanos, he was its chief operating officer and SRE had no business activity that year. He gave copies of his 2014 tax return to the Department and Noh, and the court reviewed the return as well.

The trial court did not believe Saldana earned only \$600 per month. It thought Saldana's filed documents did not "ring true" and that "the whole picture [was] just not credible, based on what [he was] earning a few years ago." Saldana appeared to the court to have structured his life so as not to show much income. As for Saldana's 2014 tax returns, the court thought it did not make sense that he had made a total of \$114,000 but ended up with only \$110. It said the Department and Noh would focus on his earning capacity because he had a real estate broker's license, had run businesses, and "obviously [had] the ability to earn [an amount] significantly higher than \$600 per month."

Saldana said he had recently filed bankruptcy, had lost a lot of investment

properties and was limited to his income from work for Llanos because of the downturn in the real estate market. He was actively working to build up his real estate business, but neither he nor a real estate agent who worked for him were producing income.

The court was not convinced by this explanation either because, it said, the real estate market was “booming.” Also, it thought Saldana’s family was paying him “a piddly amount of money for landscape work” and that a full-time landscaper was probably capable of earning about four or five times more than Saldana’s claimed earnings. It told Saldana it needed as much transparency as possible from him and to know what he had done, what his plans were, and what he was doing to develop business.

The court also questioned Noh about her income and expenses. Noh said she had just learned she would no longer be receiving disability payments and planned to look for work. She might sell cars again, but was not sure because it would require her to work six days a week and spend a lot of time at a dealership to be successful. She was looking for work that would pay her something close to what she had previously earned—\$2,100 to \$2,200 per month.

The court asked Noh about \$1,752.93 in expenses for which she indicated she received assistance. Noh said she paid cash for food and gave her parents money to pay her telephone bill, and that her father helped pay her expenses. She did not have a checking or savings account, but had “a card” from Wells Fargo for her disability payments. The court said her lack of income and amount of expenses did not make sense and told Noh that regularly given clothing and income from others was considered income for child support purposes. After Noh said she lived with her family, the court admonished her that she was supposed to list in her declaration everyone living in her household and what they earned.

At the conclusion of the hearing, the court stated that neither party was very believable. It told both parties to provide new income and expense declarations and six months of bank statements before the next day of the hearing and later issued a written order to that effect.

IV.

The Parties' Updated Income and Expense Declarations

In a subsequently updated income and expense declaration filed a week before the second day of the hearing, Noh stated she had received her last disability payment and a slight increase in food stamp benefits, had applied for unemployment benefits and was looking for work. Her August 2015 income was \$1,444 and her average monthly income was \$1,672, which included a \$3,059 earned income tax credit. She and minor lived with her parents, who paid an average of \$1,191.46 toward her monthly expenses of \$2,863.46.

In an updated income and expense declaration he filed on the second day of the hearing, Saldana again stated an average monthly income of \$600 from work as a Llanos landscaper and claimed monthly expenses of \$940. He estimated Noh's gross monthly income was \$5,000 based on internet postings by her about a gym membership and a new phone. He attached an August 10, 2015 pay check stub for \$1,000 and another dated September 27, 2015, for \$900, as well as a Schedule C Profit or Loss and Schedule D Capital Gains and Losses statements from his 2014 tax return. He did not include any bank statements.

V.

The Second Day of Hearing and the Court's Ruling

On the second day of the hearing, Saldana and Noh were both sworn in to testify. The trial court said it still did not believe either party due to "so many inconsistencies in what was in the paperwork and what the documents say." It asked the Department to explain the income used for its submitted child support calculations. The Department's counsel indicated its first calculation showed a monthly income of \$6,333 for Saldana based on the average Sonoma County real estate broker's yearly salary of \$76,000; the second showed an average income for Saldana of \$26,000 per year as a landscaper "based on the first page of the second package of information;" and the third showed income for Saldana of \$3,466 (presumably a month) "based on landscaping/laborer opportunities" at \$20 an hour. In explaining these calculations, the Department's counsel

said she provided the court with “two different piles of listings of comparable wages and employment opportunities available.” The parties agree the record does not indicate these documents were admitted into evidence.²

The trial court first reviewed Noh’s financial status, including a car loan, Wells Fargo account statements, and her father’s declaration regarding expenses he paid for Noh and minor. The court raised some issues about the completeness of Noh’s submission and concluded it would impute to her a minimum of \$1,998 per month in non-taxable income, which included bills and expenses Noh said were being paid by her family.

The court stated it had a “bigger problem” with Saldana’s representations. It then calculated child support based on Saldana having minor 30 percent of the time (resolving a small difference between the parties’ estimates), Noh having a monthly income of \$1,998 and Saldana making \$20 an hour. This calculation indicated Saldana should pay \$447 a month in child support to Noh.

After the court completed its calculation and discussed matters related to a written judgment, it had the following exchange with Saldana:

“MR. SALDANA: Your Honor, am I going to be able to say something?

“THE COURT: Well, not much.

“MR. SALDANA: Well—

“THE COURT: I’ve looked at the paperwork. I don’t believe it. I don’t believe you are making \$600 a month. I was inclined to use your gross income from 2014, which was \$6,000 and something a month. I’m okay with the \$20 an hour.

“MR. SALDANA: Your Honor, but I’ve provided information—

“THE COURT: You provided incredible information. I don’t believe you. Judge DeMeo didn’t believe you years ago. I don’t believe you. I don’t believe much of what mom says. Neither one of you is very truthful.

“MR. SALDANA: I understand you don’t believe that, your Honor, but I

² Saldana states that “some website printouts” were served to him on the second day of the hearing.

disagree. And I believe that—

“THE COURT: I’m not going to let you talk because I’ve already made my ruling. I’ve looked at all your documents, and I’ve made a decision.

“Mr. Bailiff, he is not to ask me any more questions.”

The hearing concluded shortly after this exchange.

In its first supplemental judgment, filed on September 29, 2015, the trial court ordered that Saldana’s child support obligation of \$447 a month was effective as of July 1, 2015, based on the date of Saldana’s answer. It also ordered Saldana to make payments on arrears at \$53 per month commencing October 1, 2015.

Saldana filed a timely notice of appeal on November 30, 2015.³

DISCUSSION

I.

The Court Did Not Err in Applying the Uniform Guideline.

Saldana first argues that the trial court improperly deviated from the Family Code’s uniform guideline for calculating child support by basing its ruling on something other than Saldana’s tax return without sufficient explanation and although Noh made no request that it do so. The court did not deviate from the guideline. Rather, it exercised its statutorily authorized discretion to base Saldana’s gross income on his earning potential in applying the uniform guideline. Saldana does not establish that any further explanation or any request by Noh was necessary for it to do so.

“ ‘California has a strong public policy in favor of adequate child support. [Citations.] That policy is expressed in statutes embodying the statewide uniform child support guideline. (See §§ 4050–4076.) ‘The guideline seeks to place the interests of children as the state’s top priority.’” (§ 4053, subd. (e).) In setting guideline support, the courts are required to adhere to certain principles, including these: “A parent’s first and

³ The record does not show that anyone served the court’s September 29, 2015 first supplemental judgment on Saldana. Therefore, Saldana had 180 days from the entry of judgment to file his notice of appeal. (Cal. Rules of Court, rule 8.104(a)(1).) Thus, his November 30, 2015 notice of appeal was timely filed.

principal obligation is to support his or her minor children according to the parent's circumstances and station in life." (§ 4053, subd. (a).) "Each parent should pay for the support of the children according to his or her ability." (§ 4053, subd. (d).) "Children should share in the standard of living of both parents. Child support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children." (§ 4053, subd.(f).)' [Citation.]

"To implement these policies, courts are required to calculate child support under the statutory guidelines. (See §§ 4052–4055.) '[A]dherence to the guidelines is mandatory, and the trial court may not depart from them except in the special circumstances enumerated in the statutes. (§§ 4052, 4053, subd. (k); [citation].)' " (*In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1236–1237.)

The uniform guideline calls for the calculation of child support based on a mathematical formula that includes each parent's net disposable income.⁴ (§ 4055, subd. (b)(1)(E), (2).) Net disposable income is derived by deducting certain amounts from the parent's gross income. (§ 4059.) The amount of each parent's gross income, therefore, is relevant to the calculation of child support pursuant to the uniform guideline.

"Gross income" includes "[i]ncome . . . received from a person not a party to the proceeding," "[i]ncome from the proprietorship of a business," and, "[i]n the discretion of the court, employee benefits or self-employment benefits." (§ 4058, subd. (a) (1)–(3).) Further, in calculating a parent's annual gross income, "[t]he court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (*Id.*, subd. (b).) A court's use of earning capacity in lieu of a parent's stated income pursuant to section 4058 is a "statutory exception to the tax model of income." (*In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 333, italics

⁴ The statewide uniform guideline formula for determining child support is: Child Support = K [HN - (H%)(TN)], with K being the amount of both parents' income to be allocated for child support, HN being the high earner's net monthly disposable income, H% being the approximate percentage of time that the high earner has or will have primary responsibility for the children compared to the other parent and TN being the total net monthly disposable income of both parties. (§ 4055, subds. (a), (b).)

omitted.)

The guideline amount of child support calculated pursuant to the statutorily defined mathematical formula is presumptively correct. (§ 4057; *In re Marriage of Williams, supra*, 150 Cal.App.4th at p. 1237.) This presumptive correctness may only be rebutted by admissible evidence showing that application of the guideline would be unjust or inappropriate in the particular case, consistent with the principles set forth in section 4053 and based on evidence of the existence of certain factors stated in section 4057.⁵ (*In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 641.) In such a case, the court must state in writing or on the record the amount of support that would have been ordered under the guideline formula, the reasons the amount of support ordered differs from the guideline formula amount and the reasons the amount of support ordered is consistent with the best interests of the children. (§ 4056, subd. (a)(1)–(3).)

We review child support orders based on the trial court’s decision to impute income to a parent based on the parent’s earning capacity for an abuse of discretion. (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 994 (*Hinman*).) To the extent Saldana contends that the trial court improperly applied the legally required child support standards, we review his arguments de novo. (*In re Marriage of Bodo* (2011) 198 Cal.App.4th 373, 384.)

Saldana argues the trial court somehow “deviated” from the uniform guideline without making the statements required by section 4056. The implication of his argument is that the court deviated when it relied on something other than his 2014 tax return to estimate his income—in this case, apparently, certain documents from the

⁵ These factors are that the parties have stipulated to a different amount of child support under section 4065, subdivision (a); the sale of the family residence is deferred pursuant to statute and the rental value of the family residence where the children reside exceeds the mortgage payments, homeowner’s insurance, and property taxes; the parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children; a party is not contributing to the needs of the children at a level commensurate with that party’s custodial time; and application of the formula would be unjust or inappropriate due to special circumstances in the particular case. (§ 4057, subd. (b)(1)–(5).)

Department showing “landscaper/laborer opportunities” paying \$20 an hour. This is incorrect.

Whether a court’s child support calculation based on a parent’s earning capacity departs from the uniform guideline formula was considered in *In re Marriage of LaBass and Munsee* (1997) 56 Cal.App.4th 1331 (*LaBass*). There, the trial court calculated the father’s child support obligation based on the mother’s earning capacity as a teacher and the mother appealed. (*Id.* at pp. 1335–1336.) The appellate court rejected the argument that the trial court had departed from the uniform guideline formula; rather, the court “merely exercised the discretion expressly vested in it by [Family Code] section 4058, subdivision (b), to substitute earning capacity for actual income in applying the guideline formula.” (*Id.* at pp. 1336–1337, italics omitted.)

In reaching this conclusion, the *LaBass* court cited section 4053, subdivision (c), which requires that the guideline take into account each parent’s actual income, and section 4053, subdivision (d), which requires that each parent pay for the support of the children according to his or her ability. (*LaBass, supra*, 56 Cal.App.4th at p. 1337.) The court reasoned these two provisions read together indicated that while actual income must be considered in implementing the guideline formula, so must the parent’s ability to earn. (*Ibid.*) It concluded that section 4058 “actuates both of these principles by allowing the [trial] court to substitute earning capacity for actual earnings, consistent with the best interest of the child.” (*LaBass*, at p. 1337.) Because actual income is taken into account in deciding to base child support on earning capacity, the court found there was no inconsistency between the guideline principles and imputation of income. (*Ibid.*)

Here, the trial court’s remarks indicated it found Saldana’s representations of his income, including in the documents he submitted to the court such as his 2014 income tax return, lacked credibility, causing it to look to his earning capacity to approximate his income. Despite the Department’s contentions about Saldana’s earning capacity as a real estate broker, the court estimated his earning capacity based only on its conclusion that he could earn \$20 an hour as a “landscaper/laborer,” the job which Saldana had indicated he was doing as an independent contractor for Llanos. We see no abuse of discretion by

the court in relying on this earning capacity rather than Saldana's stated income.

Further, we follow *LaBass* and conclude the trial court did not deviate from the uniform guideline in relying on Saldana's earning capacity as a landscaper/laborer to establish his gross income. The record indicates the court considered Saldana's actual earnings as a landscaper in doing so, as it limited its conclusion about his earning capacity to the work for which he had earned income, and did not impute any for his real estate broker activities, for which he had no recent earnings, even though he had an active real estate broker's license and real estate business. The court's first supplemental judgment ordering Saldana to pay \$447 in child support to Noh further confirms that it did not deviate from the uniform guideline. This judgment states, "Attached is a computer printout showing the parents' incomes and percentage of time each parent spends with the children. The printout, which shows the calculation of child support payable, will become the court's findings." The attached computer printout, entitled "Guideline Calculation Results Summary," contains calculations consistent with the uniform guideline and states as "guideline findings" that "JOSE LUIS SALDANA ZAVALA is required to pay MIRANDA ANNE NOH \$447.00 in CURRENT SUPPORT."

Because the trial court did not deviate from the uniform guideline in ordering Saldana to pay child support of \$447 per month to Noh, it did not need to make the further statements on the record or in writing that Saldana argues it was statutorily required to make. His argument is without merit.

Saldana also seeks reversal because the court's imputation of income to him based his earning capacity "was not requested by the party which would benefit from the imputation." This is Saldana's entire argument on this subject. Because of its conclusory nature and his failure to cite any legal authority in support of it, we disregard it. (Cal. Rules of Court, rule 8.204(a)(1)(B) [arguments should be supported by legal authority whenever possible]; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 ["Where a point is merely asserted . . . without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion' "].) We see no reason why

the court pursuant to its statutory authority could not exercise its statutory discretion to use Saldana's earning capacity as a basis for his gross income, particularly when the Department urged it to do so. (See § 17400 [county child support agency is responsible for effectively establishing child support obligations and shall take appropriate action to do so, including obtaining an initial order of support]; § 4002, subd. (a) [giving the agency authority to enforce the child's right to support against a parent].)

II.

The Trial Court's Child Support Order Was Not Based on Evidence.

Saldana next argues we must reverse the trial court's first supplemental judgment because the court did not base its calculation of Saldana's earning capacity on any information that was actually admitted into evidence. The Department does not contest this is the case. We agree.

A trial court has discretion pursuant to section 4058 to consider a parent's earning capacity in lieu of actual income when setting child support pursuant to the uniform guideline. "[E]arning capacity" represents the income the spouse is reasonably capable of earning based upon the spouse's age, health, education, marketable skills, employment history, and the availability of employment opportunities." (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234.) Thus, a trial court may impute income to an underemployed parent when the parent has the ability, willingness and opportunity to work. (*Hinman, supra*, 55 Cal.App.4th at p. 995 & fn. 6.) The only limitations against doing so are where the parent has *no* earning capacity or when relying on earning capacity would not be consistent with the best interests of the child. (*Id.* at p. 998.) " "Bad faith" (deliberate avoidance of family financial responsibilities) is *not* a condition precedent to imputation of income in setting the amount of child support." (*Ibid.*)

"The party seeking to have income imputed bears the burden of demonstrating opportunity to earn that income" (*Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, 685.) The court typically considers such factors as "the imputee's resume, want ads for persons with the credentials of the potential imputee, opinion testimony (e.g., from a professional job counselor) that a person with the imputee's credential could readily

secure a job with a given employer (or set of employers), or pay scales correlating ability and opportunity with the income to be imputed . . . [or a] vocational examination.” (*In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1309.) “ ‘Figures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation.’ ” (*In re Marriage of Smith* (2001) 90 Cal.App.4th 74, 82.) A mere unsworn assertion by an attorney is not evidence that a trial court may rely on in its findings of fact. (*Estate of Silver* (1949) 92 Cal.App.2d 173, 176.)

Here, the trial court appears to have based its determination of Saldana’s earning capacity on the Department’s material, only vaguely identified in the reporter’s transcript of the hearing, indicating there were landscaper/laborer employment opportunities at \$20 an hour. However, these documents were not admitted into evidence, nor is there any indication that Saldana had the opportunity address their content (a matter which we will discuss further below). We reverse the trial court’s first supplemental judgment because it is not based on evidence, and remand this case to the trial court for further proceedings consistent with this opinion.

III.

On Remand, Saldana Should Be Afforded a Full Opportunity to Be Heard.

Saldana also contends his due process rights were violated when the trial court denied him the opportunity to be heard on the second day of the hearing on the Department’s motion for judgment. We need not decide this issue in light of our reversal based on the lack of evidence. We briefly address it in light of our remand of this matter for further proceedings consistent with this opinion.

As our discussion of the background of this case indicates, on the second day of the hearing on the Department’s motion, when the trial court made its child support ruling, the court denied Saldana, appearing in propria persona, a full opportunity to be heard. The record indicates the court ruled on the issue of child support without allowing Saldana to argue at the hearing, basing its evaluation of his position entirely on his written submissions. When Saldana politely inquired about whether he could say something, the court referred to his written submissions and denied him the

opportunity to be heard, going so far as to instruct the bailiff not to allow him to further address the court. Regardless of the court's conclusion that Saldana was not presenting credible information to the court, he had the fundamental due process right to argue his case at the hearing. (See, e.g., *Richards v. Jefferson County* (1996) 517 U.S. 793, 797, fn. 4 ["The opportunity to be heard is an essential requisite of due process of law in judicial proceedings"].) The trial court should give him a full opportunity to be heard on remand.

DISPOSITION

The judgment is reversed. Saldana is awarded costs of appeal.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.

Saldana v. Noh (A146949)